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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH PAUL WILSON,

Defendant and Appellant.

F078393

(Super. Ct. No. F17904327)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. John N. Gallagher, Jr., Judge. (Retired Judge of the Fresno County Sup. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Detjen, J., and Snauffer, J.

STATEMENT OF APPEALABILITY

This appeal follows appellant Keith Paul Wilson’s pleas of no contest in which the trial court granted his Request for a Certificate of Probable Cause. The appeal is authorized under Penal Code section 1237.5.¹

STATEMENT OF THE CASE

On November 27, 2017, Wilson was charged by information with the felonies of battery upon a peace officer (§ 243, subd. (c)(2); count 1) and resisting an executive officer (§ 69; count 2), and the misdemeanors of obstructing or delaying a peace officer (§ 148, subd. (a)(1); count 3), and giving false information to a police officer (§ 148.9, subd. (a); count 4). The information also alleged Wilson had two prior “strike” offenses (§§ 667, subds. (b) – (i), 1170.12, subd. (a)-(d)). At arraignment on December 5, 2017, a tentative jury trial date was set for January 22, 2018.² This was within the “time out date” for the trial of February 3.

On July 16, after multiple continuances,³ Wilson requested a *Marsden*⁴ hearing as to Attorney C. Barrett (his seventh court-appointed attorney. The next day, following an in camera hearing from which the prosecutor was excluded, the trial court denied Wilson’s *Marsden* motion.

On July 24, based on defense counsel’s C. Barrett’s declaration of conflict, the trial court appointed new counsel, K. Simsarian, to represent Wilson.

¹ Undesignated statutory references are to the Penal Code.

² Subsequent references to dates are to dates in 2018 unless otherwise stated.

³ Although not expressly noted in the minutes, it appears that Wilson was proceeding on a no-time waiver basis, requesting a jury trial within 60 days of his arraignment. (§ 1382, subd. (a)(2).) Subsequently, he entered three “specific time waivers” not to exceed 10 court days because his appointed attorney C. Barrett was “unavailable”.

⁴ *People v. Marsden* (1970) 2 Cal.3d 118.

On August 3, Wilson pled no contest to all the charges, and admitted the charged prior convictions (over the prosecutor's objection), with the understanding the trial court would grant his *Romero*⁵ motion to strike his prior convictions at sentencing and sentence him to no more than three years in state prison. As a term of the plea, Wilson also agreed to sign a waiver of confidentiality and provide analysis of his blood specimen taken in connection with the case.

On September 20, the trial court granted Wilson's *Romero* motion and struck the two prior strike convictions in the interest of justice. (§ 1385.) The trial court then sentenced him to a three-year (upper) term for the conviction for battery upon a peace officer. The court imposed, but stayed, Wilson's sentence for resisting an executive officer (§ 654), and sentenced him to credit for time served for the two misdemeanor convictions.

Wilson filed a notice of appeal on November 9.

The trial court granted Wilson's request for a certificate of probable cause. Therein, Wilson claimed his "reasonable constitutional ... or other grounds going to the legality of the ... no contest plea..." were "1. Due process, 2. Ineffective assistance of counsel, 3. Not sticking to plea agreement made based on due process, 4. Defendant being held captive for over a year."

STATEMENT OF FACTS

A. The Offense⁶

On July 25, 2017, at approximately 8:00 a.m., Fresno Police Officer Martens was conducting a routine check of a local shopping center when he saw a black sports utility vehicle parked behind the shopping center. There were three people in the vehicle.

⁵ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

⁶ Taken from the probation report's "Summary of Facts" and the transcript of the preliminary hearing on November 20, 2017.

Wilson was sitting in the front passenger seat. When Martens asked Wilson his name, Wilson responded that he was “Keith Williams.” Wilson was then removed from the vehicle, while the other two people remained inside.

When Martens conducted a search of Wilson, he became very aggressive, tensing up and pulling away from Martens. When another officer tried to help Martens put handcuffs on Wilson, Wilson pulled away and faced Martens. Martens then grabbed Wilson, and swept his legs to take him to the ground; both men fell into some nearby shrubs. Martens trapped Wilson’s legs and again attempted to put handcuffs on him. As he did so, Wilson said “I’ve got your gun in my hand,” and Martens felt a tug on his handgun, but it remained secured.

The two men continued to struggle. At one point, Wilson bit Martens’ right forearm, drawing blood. After that, another officer tased Wilson four times, but Wilson continued to struggle and ignored Martens’ commands to stop fighting. At another point, Wilson threw his legs up and around Martens’ neck, but Martens was able to break free. Eventually, additional officers arrived and Wilson was handcuffed and arrested.

In addition to the laceration on his right forearm from where Wilson bit him, Martens suffered lacerations on his left forearm and right elbow, red marks on his left wrist and the crown of his head, and his uniform was dirty and disheveled.

B. Trial Court Proceedings

On July 17, after holding an in camera hearing from which the prosecutor was excluded, the trial court denied Wilson’s *Marsden* motion as to Attorney Barrett.

On Friday, August 3, in the morning court session, Wilson appeared with newly appointed counsel, Mr. Simsarian. Mr. Simsarian informed the court Wilson was not interested in accepting the trial court’s offer, over the prosecutor’s objection, that if Wilson waived confidentiality as to the blood testing done at the time of his arrest, the court would grant his *Romero* motion and impose either a probationary term, or a 16-month, two-year, or three-year prison term.

Counsel also informed the court that trial was set for the following Monday, and that he was ready to proceed except for three issues: (1) He wanted to file a *Pitchess*⁷ motion which he could not do by Monday because it would not allow sufficient time to give notice to law enforcement; (2) he wanted to file a motion to suppress (he had already served the prosecutor); and (3) he wanted to explore presenting expert testimony regarding “unconscious behavior,” but the expert he had contacted on this issue told him he would need approximately a month to properly prepare.

Counsel continued that if the case went to trial on Monday, he would ask the trial court to hear the motion to suppress, but he would not be able to bring a *Pitchess* motion nor reach a conclusion as to whether the expert would be beneficial to Wilson’s defense. However, “with that said, I’m ready to go on Monday for trial.”

In the afternoon session, defense counsel informed the court Wilson wanted to resolve the case by accepting the trial court’s offer of granting his *Romero* motion and imposing no more than a three-year sentence. The trial court then ascertained Wilson had had enough time to read and review the change of plea and waiver of rights form with counsel, that he had signed and initialed the change of plea and waiver of rights form, that he was waiving each of the rights set forth,⁸ and that he was waiving the confidentiality of his blood sample taken the day of his arrest so that the victim could know the results. The court explained that if this were done, it would grant Wilson’s *Romero* motion and sentence him to no more than three years, even though there was “no guarantee that anything less than the three years is going to be given.” The court further informed Wilson he could be required to pay a restitution fine of up to \$900 plus any victim restitution for medical expenses.

⁷ See *Pitchess v. Superior Court* (1974) 11 Cal.3d 532.

⁸ See *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

The parties agreed that the plea was pursuant to *People v. West* (1970) 3 Cal.3d 595 and Wilson agreed there was a factual basis for the plea.

Wilson then pled no contest to all four counts. The trial court found the pleas and waivers “were made knowingly, intelligently and voluntarily.” Wilson also admitted he had been convicted of two counts of robbery in 1992 and served a prison term as a result. The court then concluded that once counsel provided the court with an analysis of the blood sample, the court would grant Wilson’s *Romero* motion and sentence him to no more than the 3-year aggravated lid.

On September 20, the trial court held a *Romero* hearing. The prosecutor informed the court that because Wilson’s blood tested positive for Hepatitis C, Martens would have to be checked for Hepatitis C once a year for six years. The prosecutor added that, contrary to the defense’s position, Wilson’s conduct was not out of character, and he had been a habitual criminal “from when he was quite young to [the] current time.” The prosecutor further stated that, while Wilson’s daughter’s letter to the court on her father’s behalf was “very heartfelt ... she loves and cares for her father ... we also have a victim ... [whose] family has to worry if he has been infected because the defendant voluntarily chose to bite him, and we would like that to be not taken lightly.”

The trial court granted Wilson’s *Romero* motion, stating as follows:

It appearing to the Court that there has been some evidence of rehabilitation of Mr. Wilson since that 1992 conviction for two counts of violation of 212.5(b), especially the fact that prior to this incident a year ago in July of 2017, his previous felony was in the year 2005. So the court finds there’s some limited evidence of rehabilitation sufficient to justify granting *Romero* for these sentencing purposes only.

With respect to what sentence should be imposed, defense counsel argued Wilson served an additional seven years on his previous conviction (1999 for possession of a controlled substance for sale) where he was sentenced under the Three Strikes law to 25 years to life and served 14 years in prison before he was resentenced to seven years.

Because of these “unusual circumstances,” Wilson’s drug issues that led to the current offense, and the fact he was “doing really well doing the trucking job ... providing for himself and his family and making a good life for himself ...”, defense counsel requested the midterm sentence of two years.

The prosecutor agreed with the probation report’s recommended sentence of the aggravated term of three years. The prosecutor again noted Wilson intentionally bit Martens’s arm while being fully aware he had Hepatitis C, and Martens could have been infected: “The People believe that the defendant’s actions in this case were very egregious, so much so that this officer now for the next five years ... has to worry about whether or not he has Hepatitis C”

Wilson also addressed the court. He noted that since being released from prison he had acted as a mentor to youths in juvenile hall, and was doing everything he could to build a life and doing well as a truck driver. Further, it was because of a motorcycle accident and having been given painkillers in the hospital that his life took a turn for the worse.

With respect to this case, he maintained he was not doing anything wrong, just sleeping, when Martens pulled him from the car. He admitted he may have overreacted, “but I was raised in prison ... You don’t get attacked while you’re asleep, you have to defend yourself. And that’s what I did.” Wilson also said he didn’t remember all the circumstances because he was tased eight times and didn’t wake up until he was in the hospital.

The trial court found Wilson was not eligible for probation, and considering the severe injury sustained by Martens who has to monitor his blood for the next six years and Wilson’s prior criminal history, the factors in aggravation outweighed those in mitigation. As such, the court imposed an aggravated three-year prison term. The court imposed, but stayed (pursuant to § 654) a three-year term for Wilson’s conviction for count 2, and sentenced him to time served for the two misdemeanor convictions. The

court determined Wilson was entitled to 845 (423 actual plus 422 conduct) days of presentence credits.

APPELLATE COURT REVIEW

Wilson's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating Wilson was advised he could file his own brief with this court. By letter on May 6, 2018, we invited Wilson to submit additional briefing. To date, he has not done so.

After independently reviewing the entire record, we have concluded there are no reasonably arguable legal or factual issues.

DISPOSITION

The judgment is affirmed.